DISSENTING VIEWS

On April 28, 2004, *60 Minutes II* aired photographs of detainees in American-run Abu Ghraib prison outside of Baghdad, Iraq. These photograph depicted men wearing hoods, stacked naked in pyramids, sexually abused, and threatened with attack dogs, casting doubt upon the nation and the world's view of the United States as a human rights leader was forever changed. In the nearly 4 months since this tragedy became public, the picture of what has happened in American run prison facilities abroad has only worsened. A recent report found approximately 300 allegations of abuse,[1] and ongoing investigations will likely turn up more. In fact, the press continues to uncover more stories, each more depraved than the next, some of which even involve the use of attack dogs on children.[2]

As members of the Judiciary Committee, we were even more ashamed when it became apparent that the Justice Department and its Office of Legal Counsel were twisting and distorting well settled law in order to shield the Administration from any liability for these acts. This resolution was drafted to request all the documents produced in that effort.

We strongly dissent from this Committee's decision to adversely report H. Res. 700. Those Office of Legal Counsel memoranda that have been either leaked to the press or released by the White House detail an intricate, though faulty, argument for why tortuous treatment of prisoners is not barred by American or international law. It is this Committee's duty to trace the evolution of these documents to discover who commissioned these documents and whether the blank check given to the Administration under their rationale was ever used. We are gravely disappointed that this Committee shirked that critical oversight responsibility.

A. THE HISTORY OF H. RES. 700 AND OTHER CONGRESSIONAL OR ADMINISTRATION INQUIRIES

H. Res. 700 was introduced on June 25, 2004 by Congressman Conyers and 45 cosponsors. It directed the Attorney General to transmit to the House of Representatives all documents in his possession relating to the treatment of prisoners and detainees in Iraq, Afghanistan and Guantanamo Bay. On July 21, 2004, the resolution was reported unfavorably by the Committee on a party-line vote of 15 to 12.

While there have been a few hearings in the House and Senate about abuse at Abu Ghraib, none have taken a systematic review of the circumstances, including legal justifications, leading to the

[1] Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004, at http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

[2] Josh White and Thomas E. Ricks, *Iraqi Teens Abused at Abu Ghraib, Report Finds,* WASH. POST, Aug. 24, 2004 at A1.

abuse. Those hearings dealt with the military chain of command and reviewed Maj. Gen. Taguba's report issued in March;[3] they did not unveil new information, nor did they address the myriad issues that this resolution would have. Most importantly, H. Res. 700 would have garnered all legal advice about the international laws of war and U.S. torture statutes given to the Administration. At this time, no body has reviewed how such faulty legal opinions could have been generated by such a prestigious office, nor how those opinions affected the decision making of the Administration. The resolution also would have solicited any information about contractors and their role in prisons, solely held by the Department of Justice.

Ongoing Administration and military investigations are often cited as the reason for Congress' inaction. Again, it is important to note that none of those ongoing investigations are inquiring about the Justice Department's role in sanctioning such behavior. Because that is the sole purview of this Committee, this Committee's silence on the abuse leaves the Department's legal fiction unquestioned. While the Administration has promised to review these memoranda and to rewrite those sections that are "overbroad"—as it terms the justification of torture[4]—there has been no comprehensive repudiation of the memoranda, and as of yet, the memoranda have not been revised or replaced.

This Committee's refusal to exercise its oversight role is not unique. Every attempt to review these serious charges of abuse and inhuman treatment on a bipartisan basis has been rejected, and with each request that has been made to them, the House Republicans have responded by challenging the patriotism of those who question the tactics of the administration.[5]

B. RECENT RELEASE OF JUSTICE DEPARTMENT AND OTHER DEPARTMENTAL MEMORANDA

On, June 23, 2004, the White House and Department of State released a number of documents relating to the treatment of detainees. There are also a number of memoranda that have been leaked and distributed on the Internet. Those drafted by the Justice Department, or drafted on its advice, include:

- January 22, 2002, Department of Justice memorandum to Alberto Gonzales regarding "Application of Treaties and Laws to al Qaeda and Taliban Detainees"
- February 1, 2002, Attorney General Letter to President regarding status of Taliban detainees
- February 7, 2002, Department of Justice memorandum regarding "Status of Taliban forces Under Article 4 of the Third Geneva Convention of 1949"

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[3] Major General Antonio M. Taguba, Article 15–6 Investigation of the 800th Military Police Brigade.

[4] Mike Allen and Susan Schmidt, *Memo on Interrogation Tactics is Disavowed,* WASH. POST, June 23, 2004 at A1.

[5] *See,* for example, "There are well over 140 criminal investigations into detainee abuse worldwide that are ongoing . . . we should not divert further executive branch resources and energy in the midst of a global war." Statement of Chairman Henry J. Hyde Before the Committee on International Relations, July 15, 2004.

- February 7, 2002, Presidential memorandum regarding "Humane Treatment of al Qaeda and Taliban Detainees"
- February 26, 2002, Department of Justice memorandum regarding "Potential Legal Constraints applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan"
- August 1, 2002, Department of Justice letter regarding application of Convention Against Torture and Rome Statute on the International Criminal Court
- August 1, 2002, Department of Justice memorandum regarding "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A."

In tandem, these documents argue that 1) the Geneva Conventions and other international laws banning torture do not apply to our detainees, 2) if they do, they can be construed so narrowly that events such as those at Abu Ghraib are not legally 'torture," and 3) even if these acts could be defined as "torture," the Administration and its military are not liable under the President's Commander-in-chief authority and other defenses.

The Justice Department vehemently refused to publicly release these documents in their entirety, despite the fact that several had been leaked to the press and widely distributed on the Internet.[6] The Attorney General stated before the Senate Judiciary Committee that, "I believe it is essential to the operation of the executive branch that the president have the opportunity to get information from the attorney general that is confidential."[7] Two weeks later, the President released 13 documents to the press, including those listed above and others from the Department of Defense detailing the approval of specific interrogation techniques.

C. PUBLICLY RELEASED MEMORANDA CONTRAVENE LONG ESTABLISHED LAW

Those memos that are now publicly available show marked deviation from long established law. As David B. Rivkin Jr., former White House lawyer in the Reagan administration, and a supporter of the August 1, 2002 memo himself admitted, "If you line up 1,000 law professors, only six or seven would sign up to it."[8] In fact, attorneys have come out in full force against the memoranda's legal conclusions. Over 300 attorneys have signed a bipartisan *Lawyers' Statement on Bush Administration's Torture Memos* that denounces the legal arguments in the memo, including 12 former judges, eight former American Bar Association Presidents, and countless human rights professors and advocates.[9] Also, the American Bar Association has passed a resolution condemning any "endorsement or authorization of [torture] by government lawyers, officials and agents."[10]

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[6] Susan Schmidt, *Ashcroft Refuses to Release '02 Memo,* WASH. POST, June 9, 2004 at A1.

[7] *DOJ Oversight: Terrorism and Other Topics, Hearing Before the Senate Judiciary Committee,* 108th Cong., (June 8, 2004) (statement of Attorney General John D. Ashcroft).

[8] R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos,* WASH. POST, July 4, 2004 at A12.

[9] Letter *available at www.allianceforjustice.org.*

[10] ABA, Resolution on the use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government, at 4–5.

Because these documents are so far afield of the legal consensus in the American and International legal community, an investigation into their creation and to what extent they evolved and were utilized is necessary.

1. The memoranda incorrectly conclude that international protections do not apply to many detainees in U.S. custody.

The memoranda advise the President that the Geneva Conventions do not apply to al Qaeda or Taliban detainees. The Third Geneva Convention applies to recognized soldiers, or "prisoners of war," and the Fourth Convention applies to all civilians.[11] The memoranda argue that because these groups are technically neither, and are instead "enemy combatants" or "illegal combatants," they do not receive any protections. On February 7, 2002, the President affirmed this logic and announced that the treatment of neither group would be governed by the Conventions, although the detainees would be treated "consistent" with such principles.[12]

However, long standing international interpretations of the Geneva Conventions state that a person "cannot fall outside of the law," and that each individual must fall under either the Third or Fourth Conventions.[13] Even if the Administration can withhold prisoner of war status from the detainees, they are bound to treat them with the respect afforded to citizens under the Fourth Convention. As the International Committee of the Red Cross stated in its commentary to the Fourth Convention:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can fall outside the law.[14]

Therefore, the detainees are protected by Common Article 3 of the Conventions, which prohibit "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . outrages upon personal dignity, in particular humiliating and degrading treatment." [15]

Even if the argument that enemy combatants do not fall under either the Third or Fourth Conventions is accepted, detainees are clearly afforded protection against torture and other degrading treatment. Customary law, adopted through tradition of the United States and other nations, has established the common practice that these protections are larger than technical legal definitions. And at the very least, Article 75 of Protocol 1 of the Geneva Conventions covers the rights of anyone captured on the battlefield and clarifies

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[11] Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 351, 75 U.N.T.S. 287.

[12] Memorandum from the President of the United States, to the Vice President, et. al, Regarding the Humane Treatment of al Qaeda and Taliban Detainees (February 7, 2002).

[13] Summary of International and U.S. Law Prohibiting Torture and Other Ill-Treatment of Persons in Custody," Human Rights Watch, May 24, 2004 (citing Geneva Convention III & IV, Art. 3).

[14] International Committee of the Red Cross, "Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War," (Geneva: 1958).

[15] *See supra* note 12.

the responsibilities of nations to civilians, military forces, non-state aggressors and others caught during a war. It prohibits murder, "torture of all kinds, whether physical or mental," "corporal punishment," and "outrages upon personal dignity, in particular humiliating and degrading treatment, . . . and any form of indecent assault."[16] Because these provisions cover everyone, whether civilian, military, or somewhere in between, torture and other degrading treatment is banned regardless of how the U.S. classifies the detainees. While the United States has not officially adopted Protocol 1, "article 75 is widely considered to be universally binding as customary international law." [17]

Finally, what is sorely missing from this analysis is the recognition that the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the torture of anyone at anytime, and does not differentiate amongst captives.[18] Regardless of whether the Geneva Conventions apply, torture is prohibited by international law by this treaty.

2. The memoranda narrowly redefine torture in ways unsupported by law.

The August 1, 2002 Department of Justice memo creates a definition of torture that is contrary to international law, domestic law and legislative intent. The memo claims that torture consists of "extreme acts" under U.S. law, inflicting severe pain that "must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumantic [sic] stress disorder." [19] However, 18 U.S.C. § 2340–2340A, the Federal law executing the U.N. Convention Against Torture,[20] does not use the word "extreme" or otherwise suggest the conclusion that "those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention." [21] Instead, the law provides:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
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> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened ad-

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[16] Protocol (1) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3.

[17] Jennifer K. Elsea, "U.S. Treatment of Prisoners in Iraq: Selected Legal Issues," Congressional Research Service, May 24, 2004, note 15. *See also* Derek Jinks, *The Declining Significance of POW Status,* 45 HARV. INT'L. L.J. 367 (2004) (arguing that all detainees are protected by common article 3 and article 75 of Protocol 1).

[18] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

[19] Memorandum from the Department of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C §§ 2340–2340A, (August 1, 2002) at 46.

[20] Convention Against Torture *supra* note 19.

[21] Memorandum, *supra* note 20 at 1.

> ministration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."[22]

There is nothing in this definition that requires the sensation of organ failure or death nor requires mental harm rising to the level of a disorder to invoke the law's protections. In fact, the United States has repeatedly condemned far lesser acts in other countries as torture or cruel and inhuman treatment.[23]

Finally, it is important to note that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits "other cruel, inhuman or degrading treatment or punishment." Because the memoranda are mostly concerned with avoiding criminal prosecution in the United States, they only attempt to redefine torture—the only thing that is criminalized under the law. They do not mention that even if the bad actors can avoid the technical term of torture, the United States as a country would be in violation of this international agreement for lesser acts of degradation.

3. The memoranda wrongfully excuse the Administration from liability under the Commander-in-chief-clause of the Constitution.

The August 1, 2002 memorandum also argues that prosecution of a torture case under section 2340A would constitute an unconstitutional infringement of the President's ultimate authority over interrogations of enemy combatants pursuant to his Commander-in-Chief powers.[24] In essence, this means that there is no limit to actions taken under the President's military authority, not even by Congress or the courts.[25] It is a prescription for arbitrary, dictatorial power that no society faithful to the rule of law can accept; our country certainly cannot. That notion not only contravenes the basic tenet of separation of powers, but also the vast majority of international human rights norms and U.S. legal protections enshrined over the last century. Notably, the memorandum does not even mention *Youngstown Sheet & Tube Co.* v. *Sawyer*[26], where the Supreme Court held that the President's Commander-in-chief authority did not trump all other laws and Constitutional provisions.[27] As Justice Jackson stated in his famous concurrence,

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[22] 18 U.S.C. 2340A (2002).

[23] State Department Country Reports on Human Rights, 2003. The reports condemn beatings, blindfolding, burning, denial of food and water, dog attacks dripping water on a person's head, exposure to excessive heat and cold, forced painful positions, humiliation, sexual assaults, slapping, sleep deprivation, solitary confinement, stripping, water-boarding, suspension from the limbs and threats.

[24] Memorandum, *supra* note 20 at 6.

[25] *Id* at 36. "Any effort by congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield." *Id.* at 39.

[26] 343 U.S. 579 (1952).

[27] *See id.* at 587 (invalidating an Executive Order directing the Secretary of Commerce to seize and run privately owned steel mills for the benefit of the military).

"when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . Presidential claim to [such] a power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[28] The memorandum also omits *Missouri* v. *Holland*, a case in which the Supreme Court held that absent some other constitutionally explicit authority to the contrary, international treaties created under Article 6 of the constitution are binding law.[29]

The Supreme Court recommitted this system of checks and balances in *Hamdi* v. *Rumsfeld*, decided on June 28, 2004. Justice O'Connor said the Government's argument that courts were required to forgo examination of the enemy combatant case "cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[30] Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[31] In view of what we have learned in recent months and weeks about the inhumane and shameful treatment inflicted on detainees in our custody, the insistence in the August 2, 2002 memo that no limits can be imposed on the President in his capacity as Commander-in-Chief must be rejected.

We strongly believe that the President may not use his Commander-in-chief authority to override lawfully created international treaties or portions of the United States Code; in the present case, the Geneva Conventions, the Convention Against Torture, and 18 U.S.C. §§ 2340–2340A.

4. The memoranda incorrectly invoke the "necessity defense" in justifying torture.

Similarly, the August 1, 2002 memorandum's analysis of the availability of the necessity defense is erroneous. Article 2 of the Convention Against Torture clearly says that torture is always prohibited; there are no exceptions for wartime situations or states of emergency.[32] The crime of torture, following the convention, is codified in the U.S. Code, yet the memo says that the necessity defense is available because "Congress has not explicitly made a determina-

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[28] *Id.* at 637–38. (Jackson, J., concurring).

[29] *Missouri* v. *Holland,* 252 U.S. 416, 432 (1920) (". . . the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.")(holding that states' 10th Amendment rights could not overrule an international treaty protecting birds).

[30] *Hamdi* v. *Rumsfeld,* 124 S.Ct. 2633, 2650 (2004)(citing *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952)).

[31] *Id.* (citing *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989)(". . . the separation of powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 426 (1934)(". . . even the war power does not remove constitutional limitations safeguarding essential liberties."))

[32] Convention Against Torture, *supra* note 19, art. 2. ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.")

tion of values vis-a-vis torture."[33] The analysis concludes that because Congress did not specifically exclude the necessity defense in the enacting statute, it must have intended to include it.[34] This argument justifying the bizarre reading of section 2340 is illogical, and no case law or legislative history is cited to support this interpretation.

5. The memoranda incorrectly use a "self-defense" theory to justify torture.

Finally the August 1, 2002 memorandum takes self-defense, which is available to individuals in our criminal law, and bootstraps it into "self-defense" of nation in a period of war. The argument is that the U.S. was attacked by Al Qaeda and can, therefore, can be excused for torturing an individual in an interrogation because Al Qaeda may strike again.[35] Under this theory, torture of the one, may prevent harm to many. However, this contradicts the laws on armed conflict, especially Article 13 of the 3rd Geneva Convention that says no nation can ever torture or abuse a person in detention during an armed conflict.[36] One cannot transpose a rule of law that applies to individuals facing imminent attack onto a nation under a general threat of terrorist attack at some unknown point in the future, simply because it is politically convenient to the legal argument one wishes to create. Here, Congress has adopted the torture convention, yet the OLC argues that the President can act beyond the limits of that legislation. As noted, Justice O'Connor has now clarified that the President is not beyond the checks and balances of our separation of powers system, even and especially during this war on terrorism.[37]

D. THE PUBLICLY RELEASED MEMORANDA ARE NOT A COMPLETE PICTURE OF WHAT THE ADMINISTRATION RECEIVED AS ADVICE ON THE LAWS OF WAR.

During the markup of H. Res. 700, Chairman Sensenbrenner revealed a letter from the Justice Department assuring him that "the Administration has released all unclassified, final written opinions from the Department addressing the legality of interrogation techniques used in interrogations conducted by the United States of al Qaeda and Taliban enemy combatants."[38] He then declared this resolution unnecessary. However, H. Res. 700 would have requested a much larger universe of documents than professed available by the Justice Department. For example, it would acquire 1) drafts as well as final documents; 2) classified as well as unclassified documents; 3) all legal issues surrounding the applicability of torture laws and conventions, not just the legality of interrogation tactics; 4) all detainees in Iraq, Afghanistan and Guantanamo Bay, not just al Qaeda and the Taliban; and 5) all documents in the At-

[33] Memorandum, *supra* note 20 at 41.
[34] *Id.* at note 23.
[35] *Id.* at 42–46.
[36] Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 UST 3316.
[37] *See supra* note 31 and accompanying text.
[38] Letter to the Honorable F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee from William E. Moschella, Assistant Attorney General (July 20, 2004) (on file with Committee Majority office).

torney General's possession, not just those that originated in his department.

There is no reason to believe that the memoranda the White House released represent a complete accounting of all Justice Department documentation of its legal advice to the President. Indeed the July 20th letter to the Chairman appears to implicitly concede as much. Until the moment of their selective release to the press, the Administration claimed that their release would not only violate the privilege between the President and his advisors, but aid terrorists in their ability to resist future interrogations.[39]

Further, the selection of documents that have been released leave large gaps not only in time, but in substance. H. Res. 700 would have filled these holes. For example:

- The President's February 7, 2002 memorandum directing that detainees be treated humanely commands this "humane" treatment only "to the extent appropriate and consistent with military necessity." Because this is not a term recognized by law, it is unclear to what extent the Justice Department or the Administration found it militarily necessary to act inhumanely.
- The President's February 7, 2002 memorandum notes that he has "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but [he] decline[d] to exercise that authority at [that] time." It is unclear whether the President ever exercised that authority.
- The Justice Department continued to debate whether detainees could be tortured and what the legal ramifications would be long after the President's February 7, 2002 directive to treat detainees consistent wit the Geneva Conventions. This implies that further decisions were made by the President that are not reflected in the memoranda that are currently available.
- The memoranda from the Justice Department abruptly stop in August 2002. It is highly unlikely that the Justice Department has not issued any legal advice on the laws of war and how they relate to detention and interrogation over the last 2 years.
- The interrogation-specific documents stop in April 2003 and do not cover practices at Abu Ghraib and other military prisons in Iraq.
- There is a major discrepancy in the released documents that show that in December 2002, Secretary Rumsfeld approved the use of the documented abusive techniques that are in fact illegal. Secretary Rumsfeld later rescinded his approval of these techniques on Guantanamo detainees, yet these techniques later featured prominently in the documented abuses at Abu Ghraib.
- The documents that were released by DOD are incomplete and raise many questions in terms of how the illegal tactics that were approved in Guantanamo were later approved and

[39] *DOJ Oversight: Terrorism and Other Topics, Hearing Before the Senate Judiciary Committee,* 108th Cong., (June 8, 2004) (statement of Attorney General John D. Ashcroft).

applied in Afghanistan and Iraq, resulting in the torture and other mistreatment of detainees in those places.

- The memos that were released to Congress concern the DOD interrogation techniques, but nothing has been provided in terms of CIA interrogation practices.

E. CONCLUSION

This Committee has once again abdicated its oversight role. This time, we fear the repercussions will long be felt through the damage to our international reputation, the risk to our own troops when captured by the enemy, and the violation of this country's conscience. For these reasons, we dissent from the Committee's unfavorable reporting of H. Res. 700.

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